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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

D.E.,

Petitioner,

v.

THE SUPERIOR COURT OF  
SAN BERNARDINO COUNTY,

Respondent;

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

E064225

(Super.Ct.No. J250415)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Cheryl C. Kersey,  
Judge. Petition denied.

David M. Levy for Petitioner.

No appearance for Respondent.

Jean-Rene Basle, County Counsel, Dawn M. Messer, Deputy County Counsel, for  
Real Party in Interest.

Rebecca S. Lohman for Minor.

Petitioner D.E. (mother) has filed a petition for extraordinary writ pursuant to California Rules of Court, rule 8.452, challenging the juvenile court's finding that return of Z.S. (minor) (male, born May 2013) to mother's care would pose a substantial risk of detriment to the child, and order setting a Welfare and Institutions Code<sup>1</sup> section 366.26 hearing. For the reasons set forth below, we deny mother's writ petition.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. PRIOR APPEALS**

This juvenile case has a lengthy appellate history involving four prior appeals. We issued an opinion in case No. E059947, which affirmed the juvenile court's denial of reunification services to K.L.S. (father) due to his physical abuse of minor's older brother, K.S.<sup>2</sup> In case No. E061262, father filed a notice of appeal, but we subsequently dismissed the appeal for failure to file a brief. Thereafter, minor filed a notice of appeal in case No. E062236, which was dismissed at minor's request. Later, minor filed another notice of appeal and petition for writ of supersedeas or other appropriate stay with immediate stay requested of an order for custody transfer, in case No. E062853; we denied the petition on February 19, 2015. We ultimately dismissed the appeal at minor's request.

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<sup>1</sup> All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

<sup>2</sup> Mother is also the mother of K.S.; K.S. (male, born June 2012) is not a subject of this appeal.

B. CURRENT APPEAL

On July 22, 2013, real party in interest San Bernardino County Department of Child and Family Services (CFS) filed a section 300 petition, pursuant to subdivisions (b) and (j) on behalf of minor because he was at risk for abuse based on the physical abuse of K.S., and the previous no-family reunification order for mother and father (collectively, “parents”).<sup>3</sup> Minor was placed in the same foster home as K.S. The juvenile court denied reunification services to father under section 361.5, subdivisions (b)(7), (b)(10), and (b)(11). Services were ordered for mother. The court urged her to separate herself from father.

Subsequently, mother made substantial progress in completing her case plan. She continued to express her desire to have minor returned to her care and had expressed that she intended on ensuring his safety. However, CFS had concerns regarding mother’s ability to ensure minor’s safety and believed that mother may have continued to have contact with father despite her claims to the contrary.

At the 12-month review, CFS recommended terminating mother’s reunification services. The social worker was concerned that mother’s engagement of services was to appease CFS rather than taking active steps to mitigate the issues that brought the family to CFS’s attention. Father also had expressed his desire to have 50/50 custody of minor. If not, father threatened to leave California with minor. The social worker noted that

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<sup>3</sup> K.S. sustained a spiral fracture to his right arm and two older rib fractures. Parents could not give a plausible explanation for the injuries and stated they believed the injuries were accidental.

there were still ongoing concerns that mother would reunite with father once the dependency was dismissed. Over the objections of CFS and minor, the court continued reunification services, ordered supervised visitation twice a week for two hours with discretion to liberalize, including overnight and weekend visits, and authority to return minor to mother on a plan of family maintenance packet approval.

By the time of the 18-month review hearing, CFS continued to recommend that mother's reunification services be terminated and that a section 366.26 hearing be set to establish a permanent plan of adoption for minor. CFS continued to have concerns regarding mother's ability to protect minor from father. Parents continued to have separate supervised visits with minor, which were appropriate. The social worker opined that visits were unproductive as minor did not appear to have a significant bond with parents. Meanwhile, minor continued to reside with the same foster family, along with K.S. Minor was bonded with the foster family and K.S., and would cry when leaving them to visit with parents.

Despite the recommendations made by CFS, on January 30, 2015, the juvenile court ordered the social worker to transition minor back to mother with full custody. The court ordered four hours of unsupervised visitation initially for two days, with transition to eight hours of unsupervised visitation, and ultimately, overnight visits. The court also ordered father to stay away from mother and minor.

On February 10, 2015, minor's foster parents, the prospective adoptive parents of K.S., filed a section 388 petition and de facto parent request detailing how bonded minor was with them, and his emotional trauma before and after visits with mother. Minor's

foster parents requested that mother's custody be rescinded and a child psychologist be appointed to examine minor. In additional information submitted to the court on February 19, 2015, CFS noted that minor "appeared to exhibit no major concerns during his transition to and from [mother] as reported." While minor initially cried and screamed when leaving the foster parents' care, he calmed down after a few minutes and went to mother with no concerns.

On February 20, 2015, the juvenile court ordered minor be returned to mother on a family maintenance plan. A briefing schedule for the foster parents' section 388 and de facto parent request was set for March 20, 2015.

On March 30, 2015, the foster parents filed an additional section 388 petition requesting minor's removal from mother and return to their care. In an attached declaration, they indicated that they had obtained information via social media with photographs that documented mother's continued relationship with father.

In the April 7, 2015, response to the section 388 petition, CFS recommended that the foster parents' petition be denied, and that the current court order remain in effect. The social worker observed positive changes in minor's personality since living with mother; he was more active, talkative and extremely social. A secure attachment between minor, mother, and mother's family appeared to be developing. Mother admitted that her sister facilitated a family event that included K.S. Mother claimed that she did not know that father would be there. Mother stated that she had limited contact with father and minor was never left alone with him. The foster parents also provided

other photographs showing father with mother. However, the social worker believed that the photographs were not recent.

On April 7, 2015, the juvenile court granted a hearing on the foster parents' section 388 petition. Mother testified that, except for the recent family event, she had not communicated with or seen father since October of 2013. When mother saw father at the family event, she admitted that she did not leave or ask him to leave. Therefore, she violated the court's order. Moreover, the title to mother's car was in father's name, and she made car payments to the paternal grandfather.

Cynthia Thoele, the social worker assigned to the case, testified. She testified that she was not concerned that mother took a picture with father. Thoele still recommended that minor remain with mother; she believed mother could protect minor from father. Thoele also believed that constantly moving minor's placement would be damaging to him. She testified that she had seen minor blossom under mother's care.

After hearing argument from the parties, the juvenile court found there had been a change of circumstances demonstrating mother had violated the court's order. The court also found it was not in minor's best interest to remain with mother since she failed to protect minor. Therefore, the court granted the foster parents' section 388 petition, granted their de facto parent request, and ordered CFS to file a section 387 petition.

On April 22, 2015, CFS filed a section 387 petition stating that mother failed to protect minor from father by violating the court's order at an unauthorized family event, which placed minor at risk of abuse or neglect. CFS recommended that minor be removed from mother and placed in the custody of CFS. CFS had placed minor back

with the de facto parents. On April 23, 2015, the court found a prima facie case for detaining minor.

In the jurisdiction/disposition report filed on May 12, 2015, CFS recommended that the petition be sustained and no family reunification services be offered to either parent. In the addendum report filed on May 14, 2014, CFS still recommended that the petition be sustained. CFS, however, recommended that minor be returned to mother with in-home court-ordered supervision and no family reunification services to father. While the social worker acknowledged that mother made a bad decision by staying at the family event with father, she did not believe that minor was at risk. The social worker noted that mother had positively impacted minor as he was more assertive, outgoing, confident and happy while with mother. At the further jurisdiction/disposition hearing on May 21, 2015, CFS's counsel clarified that CFS's recommendation was to return minor to mother. The matter was continued.<sup>4</sup>

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<sup>4</sup> On June 16, 2015, the de facto parents filed a section 388 petition requesting removal of minor from mother's legal custody and continued placement in their home. The juvenile court ordered a hearing on the section 388 petition.

Minor's counsel filed a motion for clarification relating to the standard of proof the juvenile court utilized when granting the de facto parents' section 388 petition. Minor's counsel also requested that the juvenile court set aside the section 387 petition and set a section 366.26 hearing. Minor's counsel argued that it was improper for the court to order CFS to file a section 387 petition and instead, the section 388 petition hearing should have been conducted as a dispositional hearing.

Father's counsel filed an opposition to the motion indicating that a section 366.26 hearing should not be set aside since he failed to receive notice that the section 388 petition hearing would be conducted as a dispositional hearing.

On July 23, 2015, the court found the standard of proof for the section 388 petition was clear and convincing evidence. The court also proceeded under the section 387

*[footnote continued on next page]*

On August 11, 2014, after hearing argument, the juvenile court found the section 387 petition allegation to be true. Mother testified that she learned how to protect minor from abusive situations during counseling. She realized that it was a mistake staying at the family event, she was sorry, and would do whatever it took to protect minor. Thoele testified she did not believe that there was a safety risk for minor to reside with mother. Thoele believed that minor could be returned to mother's care with crisis training and a safety plan. Thoele admitted that she authored the original May 14, 2015, jurisdiction/disposition report recommending no reunification services to either parent, because she was under the belief that she had to follow the directions of the court. Thoele, however, believed that mother had protective capacity; she did not believe that mother had a relationship with father. Thoele observed a change in minor's behavior since being removed from mother's care as he was more withdrawn.

The maternal grandmother testified that she did not leave when father attended the family event. She did not believe that father was a danger to minor that day. If father were to show up at her house to visit minor, she would get a restraining order. The maternal aunt testified that she was at the family event and confirmed that father did not hold minor.

The juvenile court noted that mother was given clear directives through 18 months of reunification services to learn how to be protective. The court stated, "in this case due

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*[footnote continued from previous page]*

petition as opposed to a dispositional hearing. The de facto parents' counsel also indicated that counsel would be withdrawing the recent section 388 petition.



to the lack of clarity from the social worker, and [CFS]’s two different assessments of the situation, the Court disregards the opinion of the social worker due to her inexperience and lack of clarity in her opinion.” The court was also skeptical as to mother’s denial that she no longer had a relationship with father. The court also noted that mother’s family support system failed mother.

The court terminated mother’s reunification services and set a section 366.26 hearing. The court also reduced supervised visits from three hours per week to two hours per week.

## **DISCUSSION**

In her writ petition, mother contends that the juvenile court erred in terminating services to mother and in setting a section 366.26 hearing based on the court’s finding that the return of minor to mother would create a substantial risk of detriment to the safety, protection, or physical or emotional wellbeing of minor. CFS joins in mother’s argument and requests that mother’s writ be granted and the findings and orders of the court be reversed. For the reasons set forth below, we deny mother’s writ and affirm the juvenile court.

### **A. STANDARD OF REVIEW**

“The duty of a reviewing court is to determine whether there is any substantial evidence to support the juvenile court’s findings. In making this determination, we must decide if the evidence is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the court’s order was proper based on clear and convincing evidence.” (*Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474.)

B. SUBSTANTIAL EVIDENCE SUPPORTS THE JUVENILE COURT’S FINDING

Section 366.22, subdivision (a), provides in relevant part: “After considering the admissible and relevant evidence, the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment.”

In this case, mother contends that the juvenile court erred in finding that the return of minor to her care would pose a substantial risk of detriment. Mother argues, “[t]he bottom line question in this case is whether mother has maintained a relationship with father . . . .” CFS joins in mother’s request and argues that there was no evidence of substantial danger if minor was left in mother’s care.

Here, it is undisputed that mother received over 18 months of court-ordered reunification services to address issues of child abuse that occurred to her first child, at the hands of father. The purpose of mother’s reunification services was to prevent any abuse to minor, and to acknowledge and process that father abused her first child, K.S. Here, mother readily testified that she allowed minor to have contact with father—in direct violation of the court’s order only a month after having custody of minor returned to her. Mother excused her behavior by stating that she did not want to feel “selfish” and force her family to leave the gathering. Mother testified that family was really important

to her. Her father was not present in her life and she did not have any pictures of her father. Thus, mother wanted minor to have a picture of his family, including father; the same father who abused minor's sibling, K.S. Mother's candid and spontaneous statements demonstrated her lack of benefit from her services. Mother still failed to recognize father as the abuser of her first child. It was clear from the record that the services mother had participated in failed to assist her in making a simple decision, when she was presented with the opportunity to choose minor and his safety over everything else. The court stated, "it's unfathomable that you would want to show your child a picture of someone who abused the sibling." Equally disturbing was mother's testimony that she did not mind that father had his arms on her. These acts and statements by mother showed that mother failed to benefit from services to recognize father's risk to minor.

Moreover, there was additional evidence regarding mother's continued contact with father. First, father was the registered owner of the car mother drove, and mother made payments to the paternal grandfather. Additionally, counsel for the de facto parents showed a video from New Year's Eve 2014—mother was with someone who resembled father. Mother, however, denied knowing that father was the registered owner of the car; she was in the process of purchasing the car from the paternal grandfather. Mother also denied that the man in the video was father. Nonetheless, when the court evaluated the evidence before it, it noted the casual conversation mother had with father at the family gathering. Mother's testimony was that she had not spoken to father in over a year. However, at the family gathering, she walked up to him and asked what his lawyer was

doing for him. Due to the suspicious nature of their conversation, the court expressed its doubts that parents had remained separated. The court stated, “Right now, based on the evidence, the statements of [mother] are not trustworthy to the Court.”

Additionally, the court recognized the lack of a cognizable plan to keep minor safe in mother’s care. Thoele testified that with services in place, minor could be returned to mother. However, her testimony regarding those services was muddled. Initially, in her report, the social worker recommended PCIT (Parent-Child Interactive Therapy) for mother and minor; when questioned about this, Thoele changed her mind and no longer recommended PCIT. Although Thoele initially testified that she would recommend “therapy with the child,” she became unsure if therapy with minor was something mother needed to do, during cross-examination by counsel for the de facto parents. The social worker also recommended having a “safety network.” However, when questioned, she stated that it would be the family members—the same family members who were present at the family gathering and were aware of mother’s violation of the court’s orders. The court noted that mother failed to use her support system, and that her support system also failed mother. Moreover, mother had failed to engage in any services since the unauthorized contact with father. Mother did not call her therapist to report what had happened. Additionally, the social worker recommended “crisis training and hypotheticals.” Nonetheless, at the time of the court’s decision, none of that training had occurred.

Furthermore, there were significant credibility issues with the witnesses who testified in favor of recommending the return of minor to mother’s custody. Issues of

credibility are clearly the domain of the trier of fact. (*In re E.B.* (2010) 184 Cal.App.4th 568, 575.)

CFS argues that minor was not at risk at the family gathering when father had unauthorized contact with minor, because there were multiple family members present there. This fact, however, does not weigh in favor of mother. Although these family members were aware of the no-contact order for father, they allowed him to be around minor, instead of insisting father leave or encouraging mother to leave with minor. Additionally, one of these family members was maternal grandmother. She admitted she lied under oath. At first, maternal grandmother denied knowing what her other daughter told CFS when K.S. was detained. Then, maternal grandmother admitted that she knew the daughter told CFS that mother was a bad mother. When asked to reconcile these two different answers, maternal grandmother admitted lying to the court in her first statement.

In addition to maternal grandmother, the court noted that “due to the lack of clarity from the social worker, and [CFS]’s two different assessments of the situation, the Court disregards the opinion of the social worker due to her inexperience and lack of clarity in her opinion.” The court stated that the “Social Worker is basically saying the child should be returned, even though the child is not safe in [mother’s] care.”

Furthermore, the juvenile court also found the statements of mother “not trustworthy.” The court found it disturbing that mother would want a picture with father—the person who abused her first child. Moreover, the court questioned the actual number of contacts mother had with father for the last 18 months. From all these facts,

coupled with the casual conversation parents had at the family gathering, the court felt that there may have been additional conversations between mother and father.

Drawing all reasonable inferences in favor of the court's ruling, the facts support the court's finding that minor would have been at risk in the care of mother. It was reasonable for the juvenile court to remove minor from mother's home based on the court's analysis of the lack of a safety network for minor, mother's lack of benefit from services she received, mother's inability to protect the child from father, and the probability of future contact with father. There is more than substantial evidence to support the court's decision. Based on the above, we find that the juvenile court properly terminated reunification services for mother and set a hearing under section 366.26.

In sum, the court stated as follows: "The Court makes a finding that exposing the minor to the father, having an insufficient support and safety system does create—and Mother's failure or inability to protect the minor does create substantial risk of abuse and neglect. The prior disposition has not been effective in the rehabilitation or protection of the minor. The Department's request to have the minor returned to Mother on family maintenance so that they continue to work with her on her theory and practice is denied.

"The mother has had 18 months of services. The learning process was in family reunification. The learning process is not in family maintenance. The only person who suffers by your failure to maintain the minor in your care is [minor]. As you have had 18 months of services, it is not appropriate, nor should [minor] have to wait for you to figure out a time period during family maintenance for you to be able to protect him. He is young. He is unable to protect himself. You were the one who was engaging in

counseling, so you could be protective. You have more work to do, according to the social worker, and you have not addressed that protection issue in your services.

“With that, the Court, then, will, in terms of disposition, make findings and orders setting a hearing, .26 hearing, in which the Court will at a later time determine a more appropriate plan for the minor.”

Based on the above, we find that substantial evidence supports the juvenile court’s finding that the return of minor to mother’s custody would create a substantial risk of detriment to him.

### **DISPOSITION**

The petition is denied.

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MILLER  
J.

We concur:

HOLLENHORST  
Acting P. J.

McKINSTER  
J.